***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 75-7316

B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

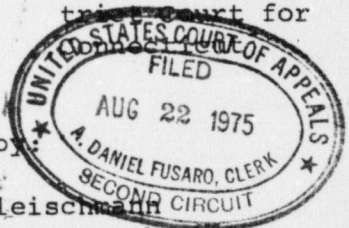
Roger deLeo,
Appellant

Docket No.
75-7316

vs.

Richard Greenfield et al
Appellees

Appellant's brief on Appeal from the District Court for Connecticut




filed by:

Karl Fleischmann
Fleischmann & Sherbacow
60 Washington Street
Hartford, Conn. 16106

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

ISSUES PRESENTED

FOR REVIEW

I. Did the District Court err in its Feb. 4, 1975 "Final Ruling on Cross Motions for Summary Judgment" (Doc. 20) because:

The Court observed that the "other due and sufficient cause" standard for teacher terminations contained in § 10 - 151 (b) (6) Conn. Gen. Stats. "standing alone is vague" (Doc. 20, Pg. 24) but,

The Court nevertheless held this vagueness was cured by a statement of reasons for termination provided to Mr. di Leo by the Superintendant of Schools (Doc. 20, Pgs. 24-25).

II. Should the appeal be dismissed because the Appellant's counsel has received payment of the judgment awarded below, or may the appeal be maintained since:

This Court should abandon its rule requiring

a party to elect between receiving a judgment and appealing unfavorable aspects of the same judgment, and

Even if the Court adheres to that rule, where, as here, the judgment is separable an appellant may receive funds under one portion and challenge a separable portion.

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES



TABLE OF STATUTES

## STATEMENT OF THE CASE

### Nature, Course and Disposition

This is an action brought under 42 U.S.C. § 1983 in which the Plaintiff was a tenured teacher who sought damages and reinstatement after having been terminated August 1, 1973 by the Bloomfield Board of Education(Doc. 1).

Upon cross motions for summary judgment the District Court, Clarie, C.J. held in an unreported decision (Doc. 16) that the admission of hearsay evidence at the hearings preceding this termination violated Plaintiff's rights of due process, but the Court denied him reinstatement and damages and ordered a rehearing by the Board of Education (Doc. 16, Page 6).

The rehearings resulted in another termination decision by the Board of Education on June 18, 1974 (Doc. 20, Page 2). On cross motions for summary judgment the District Court rejected Plaintiff's claim that this second termination

was invalid as resting upon an unconstitutionally vague statute, §10-151(b)(6). (Doc. 20, Pgs. 24-25). The Court awarded Plaintiff damages for the school year 1973-74, as mitigated, (Doc. 21, Pg. 1).

The Plaintiff's counsel received the $6,327 damages awarded for the 1973-74 school year, and appealed from the refusal of the Court to invalidate the second termination decision, which applies to the 1974-75 school year and those subsequent. (Doc. 20, Pgs 26-27). The Board of Education has sought to dismiss the appeal because of this acceptance of monies, and the argument on its motion has been consolidated with the argument of the appeal.

Statement of Facts

Prior to the summer of 1973 Roger diLeo was a teacher of French and Spanish employed by the Board of Education of Bloomfield, Connecticut. He had taught for longer than three years and

had acquired tenure under §10-151 Conn. Gen. Stats. (Doc. 20, Pl. 2). On June 21, 1973 the Bloomfield Superintendent of Schools notified him of his dismissal. He responded on June 26, 1973 with a request for a hearing as authorized by the statute and a hearing was held July 10 and July 23, 1973. The Plaintiff's employment was terminated by the Board of Education after these hearings. On September 11, 1973 Mr. diLeo commenced action in the District Court.

Paragraph 9c of the complaint alleged that this termination action violated his due process rights because hearsay was admitted. Paragraphs 9a and b are centrally involved on this appeal and alleged as follows:

> 9a. Section 10-151(b)(6) Conn. Gen. Stats., upon which the Defendant Board members rested the dismissal is so vague that the Plaintiff had insufficient notice to permit him to conform his

conduct as a teacher to its standard of "other due and sufficient cause."

9b. The letters of June 21, 1973 and July 2, 1973 quoted in paragraphs 4 and 6 above, failed to give him sufficient notice of the charges against him to enable him to prepare for the hearing.

On January 10, 1974 the Plaintiff moved for summary judgment requesting reinstatement and damages. (Doc. 7). His memorandum of law relied upon all three of the grounds asserted above: admission of hearsay, vagueness of statute, inadequacy of notice. The District Court accepted the Plaintiff's claim that the admission of hearsay had tainted his termination but rather than reinstating him simply required the Board to afford him a new hearing. (Doc. 16). Plaintiff moved for reconsideration urging the unconstitutionality of §10-151(b)(6) but the Court denied the motion. (Doc. 17).

New hearings were held May 20,1974 and June 5, 1974 and the Board by decision of June 18, 1974 again terminated the Plaintiff.

The Plaintiff then renewed his motion for summary judgment and reasserted the claim which the Court had previously ignored that the statute under which he had been terminated, §10-151(b)(6) Conn. Gen. Stats. was unconstitutionally vague. (Doc. 18).

Beginning with the complaint and throughout this litigation the Plaintiff had distinguished between his claims that the statute was too vague and his claim that the notice of charges against him was inadequate. Nevertheless, in its Final Ruling (Doc. 20, Pgs. 22-27), the Court treated both claims together and held that the notice of charges was sufficient and that this cured the vagueness of the statute. It recognized that the Plaintiff had been unconstitutionally deprived of his position for the year

which intervened between the August, 1973 termination and the June 1974 termination and after a hearing in damages awarded him a year's wages, after deduction for mitigation. (Doc. 21).

Judgment was entered for $6,327 and was promptly paid by the Board of Education. The Plaintiff then determined to appeal and did so, having deposited the monies received in a separate bank account maintained by his attorney. His attorney gave an oral undertaking to the attorney for the Defendant that if the Court should require the return of these funds as a condition for maintaining the appeal that would be accomplished promptly. The Defendants moved to dismiss the appeal on the theory that there was an inconsistency between accepting damages for the 1973-74 school year and appealing from the termination effective for subsequent years.

The parties have stipulated in this Court that the record on appeal need not include the

lengthy transcripts of Board of Education hearings which were reviewed by the District Court. It is conceded that the termination decision of June 18, 1974 was rested upon the statutory authorization contained in §10-151(b)(6),Conn. Gen. Stats. "other due and sufficient cause."

## ARGUMENT

### The Standard for Termination of Tenured Teachers Established by §10-151(b)(6) Conn. Gen. Stats. "Other Due and Sufficient Cause" is Unconstitutionally Vague and a Termination Resting Upon its Authorization is a Denial of Due Process Guaranteed by the Fourteenth Amendment.

Section 10-151 Conn. Gen. Stats. (quoted in the margin)* establishes protection against termination for teachers who have acquired tenure.

---

*§10-151 Employment of teachers. Notice and hearing on termination of contract.

(a)...The contract of employment of a teacher shall be in writing and may be terminated at any time for any of the reasons enumerated in subdivisions (1) to (6), inclusive, of subsection (b) of this section, but otherwise it shall be renewed for a second, third or fourth year unless such teacher has been notified in writing prior to March first in one school year that such contract will not be renewed for the following year, provided, upon the teacher's written request, such notice shall be supplemented within five days after receipt of such request by a statement of the reason or reasons for such

Once a teacher has begun his fourth year of employment he is said to have tenure and can only be terminated for one of six reasons set forth in the statute.

---

failure to renew. Such teacher may, upon written request filed with the board of education within ten days after the receipt of such notice, be entitled to a hearing before the board to be held within fifteen days of such request. The teacher shall have the right to appear with counsel of his choice at such hearing.

(b) Beginning with and subsequent to the fourth year of continuous employment of a teacher by a board of education, the contract of employment of a teacher shall be renewed from year to year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence; (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by competent medical evidence; (5) elimination of the position to which the teacher was appointed, if no other position exists to which he may be appointed if qualified; or (6) other due and sufficient cause; provided, prior to terminating a contract, a board of education shall give the teacher concerned a written notice that termination of his contract is under consideration and, upon written request filed by such teacher with such board within five days after receipt

Upon his request he is entitled to a statement of the reasons for any proposed termination, and to a hearing before the board of education at which he may be represented by counsel.

---

of such notice, shall within the next succeeding five days give such teacher a statement in writing of its reasons therefor. Within twenty days after receipt from a board of education of written notice that contract termination is under consideration, the teacher concerned may file with such board a written request for a hearing, which such board shall hold within fifteen days after receipt of such request. Such hearing shall be public if the teacher so requests or the board so designates. The teacher concerned shall have the right to appear with counsel of his choice at such hearing, whether public or private. A board of education shall give the teacher concerned its written decision within fifteen days after such hearing, together with a copy of a transcript of the proceedings, which shall be furnished without cost. Nothing herein contained shall deprive a board of education of the power to suspend a teacher from duty immediately when serious misconduct is charged without prejudice to the rights of the teacher as otherwise provided in this section.

Five of the six reasons set forth in the statute are not challenged. A person of reasonable intelligence can understand what is meant by inefficiency or incompetence, insubordination, moral misconduct, medical disability, or the elimination of his position. But is is impossible for a teacher to know what is meant by the sixth standard "other due and sufficient cause" so that he may conform his conduct to its requirement. The Appellant claims now, as he has claimed from the date upon which he filed his complaint, that this section of the statute is unconstitutionally vague on its face and that termination action taken pursuant to it is a denial of due process.

It is clear that a tenured teacher is entitled to due process upon any termination. Perry v. Sinderman, 408 U.S. 593 (1972). The requirements of due process vary with the context and are determined by balancing the precise nature of the interests of the parties involved.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (Frankfurter J. concurring). Plaintiff contends that under any formulation of the requirements of due process applicable to him the phrase "due and sufficient cause" embodied in §10-151(b)(6) Conn. Gen. Stats. is empty of meaning and therefore is unconstitutionally vague.*

---

*Although the courts are not absolutely uniform in their usage, the term "vague" seems generally to be distinguished from the term "overbroad." Note, Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court. 109 U. Pa. L.Rev.67 (1961). A statute which is characterized as vague is one which gives inadequate notice to the person subject to its command of the sort of conduct which is required of him. Because of the absence of guidance provided him, such a statute is unconstitutional. The claim arises under the Fourteenth Amendment. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). The focii of a challenge by reason of overbreadth are upon the latitude allowed persons in authority to impose discipline for heretical expression and upon the chilling effect such a standard has upon those subject to its unforeseeable application. The claim arises from the First Amendment as made applicable by the Fourteenth, Shelton v. Tucker,

The classical statement of the vagueness doctrine is as follows:

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

---

364 U.S. 479, 488 (1960); Elfbrandt v. Russell, 384 U.S. 11, 19 (1965). Thus the same statute is frequently both vague and overbroad. The Appellant here does not assert overbreadth because on the facts no attempt was made to inhibit his freedom of speech, N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963); Thornhill v. Alabama, 310 U.S. 88 97 (1940); but Appellant elects not to labor an oar unnecessary to row the boat that he is in. The claim here is of vagueness because the gravamen of the complaint is a termination of employment without due process. See Soglin v. Kauffman, 295 F. Supp. 978, 985 (W.D. Wisc. 1968); aff'd. 418 F. 2d 163 (7th Cir. 1969).

From early days there has been no limitation of the vagueness doctrine to criminal cases. A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925); Baggett v. Bullitt, 377 U.S. 360, 367 (1964) is an instance of the application of the doctrine to teachers.

This requirement has been adopted in the context of student discipline, Soglin vs. Kauffman, 295 F. Supp. 978 (W. D. Wisc. 1968), aff'd., 418 F. 2d 163 (7th Cir. 1969) (holding that punishment may not be imposed upon the basis of allegations of "misconduct" without reference to a reasonably clear and narrow preexisting rule which supplies an adequate guide to behavior.)

It has been thought by some courts that the rules of conduct prescribed for students need not be as precise as criminal statutes. e.g. Sill vs. Pennsylvania State University, 462 F. 2d 463, 467 (3rd Cir. 1972). But where teachers' conduct is being punished and First

Amendment rights are at stake the standards for judging permissible vagueness are to be even more strictly applied than in a criminal case. Parducci vs. Rutland, 316 F. Supp. 352 (MD Ala 1970).

One may look with care through the reported cases dealing with non-criminal sanctions in educational institutions and find no vaguer standard than "due and sufficient cause." Corporation of Haverford College vs. Reeher, 329 F. Supp. 1196 (E.D. Pa 1971) ("misdemeanor involving moral turpitude" held unconstitutionally vague); Rasche vs. Board of Trustees, 353 F. Supp. 973 (N.D. Ill 1972) ("crime of a serious nature" and "substantial disruption of the administration of the institution" held unconstitutionally vague) Meyers vs. Arcata Union High School Dist., 269 Cal App 2d 549, 75 Cal Rptr 68 (1969) ("extremes of hair style" held unconstitutionally vague). §10-151 (b)(6) gives advance notice of nothing. The plainest thing about it is its facial unconstitutionality. Mailloux vs. Kiley, 448 F. 2d 1242

(1st Cir. 1971).

The Connecticut Supreme Court has recentl had occasion to consider a claim of vagueness directed against a parallel statute. In Mitchell v. King, 37 No. 3 Conn. Law J. 4 (July 15, 1975) the Court considered whether a student could be expelled from school pursuant to the statutory standard of "conduct inimical to the best interests of the school" established by §10-234 Conn. Gen. Stats. The Court undertook a classical vagueness analysis which reached the following conclusion:

"Section 10-234, when read in the light of the legal principles enunciated, is unconstitutionally vague on its face. It does not give fair notice that certain conduct is proscribed; it makes no distinction between student conduct on or off school property, during school hours or while school is not in session. It fails to provide any meaningful indication as to what range of behavior would legitimately subject a

student to expulsion. Thus, the time, the place, and the nature of student conduct that might be deemed 'inimical to the best interests of the school' would lie entirely within the subjective discretion of the board of education. A more specific legislative standard is required."At Pg.5.

A teacher no less than a student is entitled to know in advance of acting what sort of conduct is proscribed. The due and sufficient cause standard gives no such advance notice.

It appears that the District Court may have accepted this analysis. In its final ruling on cross motions for summary judgment it observed that §10-151(b)(6) "standing alone is vague". It nevertheless went on to uphold the termination decision on the theory that the Plaintiff was given an adequate statement of the reasons for his discharge so that he could prepare for the hearing (Doc. 20, Pg. 24-25).

The trouble with this reasoning is that it confuses two distinct constitutional requirements.

A precise statutory standard is necessary in order that a teacher may know how to conduct himself while teaching. Such a standard precludes the basic unfairness of his being told on Tuesday that he had acting wrongly Monday, when he could not have made the determination for himself on Monday. The requirement of precise notice is directed toward avoiding another kind of unfairness: that of being required to defend against charges which you cannot fathom. Specific notice is required to enable the teacher or his lawyer to prepare for trial or hearing. It precludes surprise testimony.

It is therefore impossible for even the most detailed notice of charges to cure the defect of a vague statute. A notice of charges may come in time to permit preparation for hearing but cannot come in time to advise the teacher on how to conduct himself in the classroom.

The District Court erred in confusing these separate constitutional requirements, separately

alleged in the complaint (Doc. 1 ¶ 9a & b), separately argued by the Plaintiff in his briefs filed in the District Court (Doc. 7, 18), and separately applicable in this as in every case.

The Supreme Court in the Exercise Of its Supervisory Power over the Federal Courts has Ruled that Acceptance of Payment Does not Preclude Appeal from a Judgment

In United States v. Hougham 364 U.S. 310, (1960) the Supreme Court considered the question of whether the acceptance of payment of damages by a successful party precludes that party from appealing further. It held that it does not.

> It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the unsatisfactory judgment does, not, standing alone, amount to an accord and satisfaction of the entire claim. At Pg. 312.

The Supreme Court undeniably has power to promulgate such a rule for the federal courts. Ex Parte Crane 5 Peters 190 (1831) found this power to derive from the Judiciary Act of 1789, and its continued existence has been repeatedly recognized. Western Pacific Railroad Case 345 U.S. 247, 261 (1952) (Interpretation of the in banc statute 28 U.S.C. §48(c) under this "general power to supervise the administration of justice

In the federal courts"). Holland v. United States 348 U.S. 124 (1954) (Supervisory power over the lower courts required a determination of how the net worth method of proving tax evasion should be applied.) Elkins v. United States 364 U.S. 206 (1960). Fitzgerald v. United States Lines 374 U.S. 16, 21 (1963). Ker v. California 374 U.S. 23, 31 (1963).

Hougham is inexplicit on the question of whether the Supreme Court was establishing a rule which this Court must follow, or merely recognizing a "generally accepted rule" which the various Circuit Courts may follow or not as they please. The Ninth Circuit follows Hougham. Cruz v. Pac. Amer. Insurance Corp., 337 F. 2d 746,750 (9th Cir. 1964); Perkins v. Standard Oil Co. of California, 487 F. 2d 672, 675n7 (9th Cir. 1973).

It is hard to conceive of a rule more closely involved with the administration of civil justice, than one which determines whether

a party may receive payment of a judgment awarded him without foregoing his appeal. Hougham should be read as an exercise of the Supreme Court's supervisory power, binding upon this Court, because its subject matter is no less tied up with the administration of justice than is the subject matter of the various cases cited above.

Even If Hougham Does Not Bind this Court, its Rule is Sounder than the Allen Rule and this Court should Abandon Allen

The rule established by Allen v. Bank of Angelica 34 F 2d 658, 659 (2d Cir. 1929) and hitherto followed by this Court is as follows:

> [W]e have a judgment based on inseparable claims, and from which an appeal has been taken by the party who has already received the benefit of such judgment by accepting complete satisfaction of it. This is quite different from taking an appeal from a judgment which is based on separate and distinct claims, and the claim or claims for which payment has been received are no longer in controversy. Where an appeal is taken under such conditions, the appellant is not involved in the inconsistency here present, for he has received only that to which he is entitled in any event ....
>
> [In accepting payment of the judgment, appellant] necessarily had to accept at the same time the view of the law on which the judgment was based, and is estopped from prosecuting this appeal.

Careful reading of this opinion leads to the conclusion that it has as its foundation nothing more than the maxim, "you can't have your cake and eat it too." Appellant doubts

that this is enough to ground a rule of law.

Allen is a short opinion and leaves one with a variety of uncertainties. The Court observes "an appeal has been taken by the party, who has already received the benefit of [the] judgment by accepting complete satisfaction of it." There is nothing inherently persuasive about this observation -- it leaves unanswered the further question of why one can't both accept payment and appeal.

The Court distinguishes separable from unitary judgments and brands as "inconsistency" the acceptance of payment and taking of appeal from a unitary judgment. What is the inconsistency?

The Court is troubled by the fact that an unfavorable outcome on appeal may require the appellant to return money he has already received. But surely our legal system has adequate means to assure that such repayments will be made;

moreover, this consideration would only justify a rule requiring an appellant to segregate funds he has received pending the outcome of the appeal (as Appellant has here voluntarily done) rather than a rule barring the appeal.

The Court characterizes the acceptance of payment as an election and concludes that the accepter is "estopped from prosecuting this appeal." But these conclusory expressions carry no weight. If election there is, it is only because the Court says so; if the appellant is estopped it is only because the Court so holds. Why should it so hold? No real answer is provided. At bottom the decision appears to rest only on the cake maxim.

Even if this Court should conclude the Hougham decision is not obligatory, it is on its face more persuasive than Allen. Instead of holding appellant to an election he never thought he was making, Hougham looks to the actual intention of the parties in making and receiving

payment and concludes they had no intention of ending the litigation.

When a party obtains judgment he has the support of a court for his entitlement to payment. If he wishes to claim that the Court did not go far enough, the law affords him an appellate mechanism. So long as the judgment of the lower court stands the prevailing party has a legal right to the benefit of that judgment. It is an impediment to the right of appeal to bar those parties who wish to avail themselves of the moneys awarded them below while seeking more. In those cases where protection of the appellee seems to require it an appellant might be made to segregate the funds received, but his appeal should be unaffected by his acceptance. These considerations indicate that the Hougham rule is sounder than the Allen rule and that the Court should now abandon Allen.

If the Court Determines to Follow the Allen Rule, Appellant has Accepted Payment of a Portion of the Judgment Entirely Separable from the Portion under Review and May Therefore Maintain the Appeal

The complaint below (Doc. 1) was dated September 11, 1973 and asserted that the Plaintiff had been unconstitutionally terminated from his teaching position by the Defendant members of the Bloomfield Board of Education commencing with the school year 1973-74. Four separate claims of unconstitutionality were alleged in ¶9 a, b, c and d of the complaint.

Upon motion for summary judgment (Doc. 7), the District Court accepted one of these claims--that hearsay had been improperly admitted at the termination hearing--and in its Ruling of March 28, 1974 (Doc. 16), the Court ordered a new hearing before the Bloomfield Board of Education. This second hearing resulted in another termination effective June 18, 1974, which the Court

held to be constitutionally proper. (Doc. 20). Upon a hearing in damages, the Court awarded the Plaintiff $6,327.00 "for the fiscal period commencing with the unlawful discharge on August 1, 1973, to the date of his legal termination on June 18, 1974 ...." (Doc. 21, Pg. 1).

The Plaintiff had alleged in his complaint four separate theories of constitutional deprivation, but he was in no way harmed with respect to the school year 1973-74 when the District Court accepted just one of these theories and awarded him damages for that year. However, with respect to the school year 1974-75, the Court denied him relief, rejected his claim that §10-151(b)(6) Conn. Gen. Stats. is unconstitutionally vague and invalidated his 1974-75 termination.

Thus, the Appellant does not question the correctness of the result below as to the year 1973-74, does not question the correctness of the Court's ruling that the admission of hearsay

in his first termination hearing was improper, but does assert there was error in sustaining the constitutionality of the statute upon which his termination rests for the next school year.

No clearer case can be found for the application of the separable judgment theory to permit the appeal. The Appellant is not involved in the inconsistency mentioned in the Allen decision between accepting the view of the law upon which the judgment was based while challenging it on appeal. He has not accepted payments under any "single plan" using the terminology of In re Electric Power & Light Corporation 176 F 2d 687, 690 (2d Cir. 1949). He has not given Appellees any undertaking of the sort fatal to the Appellant in Wilson v. Pantasote Company 254 F 2d 700 (2d Cir. 1958) that accepting the payment of the judgment would dispose of the appeal. Rather, "the claim or claims for which payment has been received are no longer in controversy". Thus, on the Appellees own theory of law, the facts of

record require the conclusion that the Motion to Dismiss should be denied.

## CONCLUSION

A termination of employment cannot stand where it rests upon an unconstitutional statute. Appellant therefore requests that he be reinstated as a teacher in the Bloomfield schools and that the case be remanded to the District Court for a hearing in damages to determine the amount of his entitlement from June 18, 1974 to the date of his reinstatement.

Dated at Hartford, Conn. Aug. 20, 1975.

APPELLANT

By Karl Fleischmann

Karl Fleischmann
Fleischmann & Sherbacow
60 Washington Street
Hartford, Connecticut

I hereby certify that 2 copies of this brief have been mailed to Leo Rosen, Esq., One Constitution Plaza, Hartford, Connecticut.

Karl Fleischmann